

EL RANCHO PISTACHIO

IBLA 97-561

Decided March 29, 2000

Appeal from a decision of the Phoenix (Arizona) Field Office, Bureau of Land Management, assessing trespass damages. AZA-29468.

Affirmed.

1. Materials Act--Trespass: Generally

Removal of boulders beyond the amounts authorized by contract and after expiration thereof is intentional trespass when there is evidence of a reckless disregard for the expiration date and quantity limits of the contract.

2. Appraisals--Materials Act--Trespass: Generally

An appraisal will not be set aside unless an appellant shows error in the method of appraisal or shows by convincing evidence that the value is excessive. Where BLM attempts to implement the comparable use method of valuation by using a master appraisal, the Board will uphold the BLM decision where the record contains sufficient detail to show that the specific material at issue matches the representative material.

APPEARANCES: Joe V. Andersen, Phoenix, Arizona, for El Rancho Pistachio; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

El Rancho Pistachio (Appellant or Pistachio Valley Farms), through its agent Joe V. Andersen, has appealed an August 1, 1997, decision of the Phoenix (Arizona) Field Office, Bureau of Land Management (BLM), notifying J. Vance Andersen that he had "committed an act of willful trespass by removing boulders up to three years after expiration of [material] contract AZA-24566." (Decision at 2.) That trespass occurred on the SE¼ of sec. 28, T. 11. N., R. 6 W., Yavapai County, Arizona, and involved

473 tons of material. Id. at 1-2. The decision also found that Appellant had "committed an act of innocent trespass by removing [60 tons of] mineral material from" private land where the mineral estate resided in the Federal Government at Lot 2, sec. 28, T. 11 N., R. 6. W., Yavapai County, Arizona, on January 12, 1996. Id. at 2. BLM assessed Appellant a total of \$17,433.43 for the willful and innocent trespasses, and demanded payment within 30 days of receipt of the decision. Id. at 3.

Joe V. Andersen signed contract AZA-24566 on June 15, 1990, as General Managing Partner for Pistachio Valley Farms to remove 2,000 tons of boulders from the SE $\frac{1}{4}$ of sec. 28, T. 11 N., R. 6 W. The contract expired on June 14, 1991. (Contract, sec. 6.) The contract was made under the authority of the Materials Act of 1947, 30 U.S.C. §§ 601-604 (1994), and the regulations at 43 C.F.R. Part 3600. Section 1 of the Materials Act of 1947 authorized the Secretary of Interior, "under such rules and regulations as he may prescribe, [to] dispose of mineral materials including * * * stone * * * on public lands, if disposal * * * is not otherwise expressly authorized by law." 30 U.S.C. § 601 (1994).

BLM applied Arizona law to calculate the amount owed on the 473 tons removed in November-December 1994 from the SE $\frac{1}{4}$ of sec. 28 in willful trespass. ^{1/} Under Arizona state statutes, willful trespass may be assessed at triple the damages to the owner. Thus, after BLM determined that the fair market value of the boulders was \$10 per ton, it multiplied that value by the 473 tons removed. It then assessed treble damages to arrive at a figure of \$14,190. BLM then added interest for 2 years calculated at 5 percent simple interest on a yearly basis from the date the boulders were removed. This resulted in a calculation that Pistachio Valley Farms owed \$15,644.47. (Decision at 2.) Additionally, BLM determined that Appellant was liable for costs incurred by BLM as a consequence of the trespass. These administrative costs were calculated as \$375 for a custom flight for an aerial photographer, and labor costs at a geologist's hourly rate plus adjustments (\$45.22 per hour for 18 hours) for a total of \$1,188.96. Id. BLM then calculated the value of 60 tons removed in innocent trespass in Lot 2 of sec. 28 calculated at \$10 per ton for an additional \$600. Thus, the final total of trespass damages and administrative costs was \$17,433.43. Id.

In its Statement of Reasons (SOR) and Reply, Appellant does not appeal the determination that there was a trespass, but it does deny that it committed a willful trespass with respect to the 473 tons of mineral materials removed from sec. 28 in November-December 1994. It asserts that it thought it was still operating under the initial contract with respect

^{1/} The Aug. 1, 1997, decision appealed from erroneously states that the willful trespass of the 473 tons from the SE $\frac{1}{4}$ of sec. 28 occurred in November-December 1996. This date should be 1994, vice 1996, based upon the record, the July 12, 1996, initial letter to Appellant concerning the trespass, BLM's Answer at 5, and Ex. D to BLM's Answer.

to the amounts removed, and maintains that its buyer had not given it a report of the tonnage. (Reply at 1.) Appellant also challenges BLM's valuation of all the boulders removed in trespass, arguing that they should have been assessed at the \$1 per ton value set out in the contract. (SOR at 1.) Appellant maintains that the 1994 appraisal that BLM relied upon in determining the value of the boulders was "unlawful, unfair, unjust and discriminatory and done without due process of law." Id. 2/ It maintains that the appraisal should have taken into account the increased distance and difficulty of travel and extraction for boulders on El Rancho Pistachio's land, as compared to other locations in the area, as well as the fact that access to the location was across private property, which required a financial arrangement with the fee owner. Id. Appellant argues that people affected by the appraisal should have had the opportunity to provide input to the valuation of the boulders. Finally, it contends that other identical areas with like boulders "had just been determined to be of no value and given to Little Horse Ranch for \$200 plus the initial fee." Id. at 2. 3/ Appellant has submitted a portion of the October 25, 1990, BLM "Mineral Potential Report for Conveyance of Mineral Interest Application from the Little Horse Ranch" prepared by BLM mining engineer Robert Fisk (the Fisk Report). 4/

In its Answer, BLM argues that the 1990 Fisk Report relied on by Appellant was not contemporaneous with the 473-ton willful trespass or the 60-ton innocent trespass, nor did it comply with accepted appraisal standards. BLM contends that Fisk was not an appraiser and that his 1990 report assigned a value using a 1988 Regional Appraisal, whereas the 1994 appraisal was prepared by a Certified General Appraiser and reviewed by the Chief State Appraiser. (BLM's Response to Appellant's Reply at 10.) It asserts that the 1988 Appraisal "was outdated by 1994 when BLM had indications of changes in the value of boulders." Id. BLM points out that 43 C.F.R. § 3610.1-2(b) states that "[t]he authorized officer shall reappraise mineral materials disposed of under this part at intervals of not less than 2 years and shall adjust the contract unit price accordingly." (Answer at 10.)

2/ The official title of the so-called "1994 Appraisal" is "Market Analysis for Surface Boulder Mineral Sales Occurring Within the Phoenix District - BLM." As both parties refer to it as the 1994 Appraisal, so will this Board.

3/ This is a reference to a mineral conveyance to Little Horse Ranch Limited Partnership for \$200 after BLM determined that the lands had no mineral values. Patent issued on Mar. 22, 1993. (BLM Answer at 10, fn. 7.)

4/ The Fisk Report was prepared on Oct. 25, 1990, to assess the mineral potential for lands under consideration for conveyance of the mineral interest. A Jan. 20, 1993, addendum to the Fisk Report, authored by Paul J. Buff, concluded that the boulders on two of the parcels (parcels 1 and 3) had no commercial value and those on parcel 2 had an in place value of \$1/ton. The report did not state where it obtained that value. However, neither the Fisk Report or Buff addendum has any relevance to the question of the value of the boulders at issue here.

We first address Appellant's Motion to Dismiss based upon the claim that the BLM decision named a wrong party. Appellant identifies J. Vance Andersen as an attorney who had only lately started to represent his father, Joe Vance Andersen, who is the agent for El Rancho Pistachio. BLM sent the decision to "J. Vance Andersen, 7830 N. 23rd Ave., Phoenix, AZ 85021." It was delivered there on August 15, 1997, as shown by a postal Domestic Return Receipt in the record. In addition, on July 12, 1996, BLM sent a certified letter to J. Vance Andersen, at 7830 N. 23rd Avenue, Phoenix, AZ 85021, warning that contract AZA-24566 had expired on June 14, 1991, and that any removal of boulders beyond that date or in excess of the contracted amount was considered trespass. Neither J. Vance Andersen nor Joe V. Andersen informed BLM that this address or salutation was incorrect. 5/

Thus, it is clear that Appellant received correspondence addressed to Joe V. Andersen at that address and used that address for matters regarding El Rancho Pistachio. It is also clear that Appellant was not prejudiced as timely notice of appeal was filed. We find no material error in the identification of Appellant's agent in the decision, and deny the motion to dismiss.

Our resolution of the trespass issues, to include the value of boulders subject to the willful trespass determination by BLM in this case, is controlled by our prior decision in El Rancho Pistachio, 147 IBLA 205 (1999), and the regulations at 43 C.F.R. Part 3600. In El Rancho Pistachio, *supra*, Appellant there sought conveyance of the Federally-owned interest in the salable minerals in 453 acres within secs. 28 and 33, T. 11 N., R. 6 W., Gila and Salt River Meridian, Yavapai County, Arizona. 147 IBLA at 205. In that case, Appellant sought to acquire the mineral estate, reserved to the United States in 9 sections, in order that it could develop the surface for nonmineral purposes. The basis for Appellant's application under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1994), was that there is no known mineral value for the land, and that development of the surface is a more appropriate and beneficial use of the land than mineral development. 147 IBLA at 206. Using the 1990 Fisk Report, Appellant claimed the mineral estate had no value. Id. at 207.

The Board determined, however, that (1) Appellant's history of removing and selling boulders from secs. 28 and 33 disproved any argument that they had no mineral value and disproved any notion that they were inaccessible; (2) because the boulders had value, the mineral estate could not be

5/ Moreover, a J. Andersen met with a BLM geologist on Aug. 15, 1996, to discuss contract AZA-24566. The geologist prepared a memorandum to the file recording the meeting. That memorandum noted "Joe Andersen's" phone number as well as that of his son's office. There is no reason to note the son's phone number except as a way of contacting Joe V. Anderson in regard to the contract.

conveyed; (3) the Fisk Report relied upon by Appellant pertained to Little Horse Ranch for a previous patent and not the tracts for which El Rancho Pistachio was seeking the mineral estate; and (4) Appellant only decided to apply for the mineral estate when BLM raised the royalty rate from \$1 to \$10 per ton. Id. at 208-09. That decision held that the 1990 Fisk Report cited by Appellant had no relevance to the value of minerals on different lands at a later time. Id. at 209. The Board further stated: "The mineral values question, however, must be analyzed in light of current market conditions. See 60 Fed. Reg. 12710 (Mar. 8, 1995). BLM would have violated its statutory and regulatory responsibilities if it had mechanically applied an earlier mineral report * * * regardless of current conditions." Id.

These findings are directly relevant to the issues before the Board in the instant case. Having determined in El Rancho Pistachio, supra, that the Fisk Report was not contemporaneous with, or relevant to, Appellant's sale of boulders from secs. 28 and 33 in that case, we likewise find that the Fisk Report, and the 1988 appraisal, are without application here. 6/

Equally significant, claims similar to Appellant's current argument, that the 473 tons of boulders it removed in trespass are less accessible and more difficult to extract and haul because of distance and private property constraints than the comparable sales in the 1994 appraisal, were addressed and decided in El Rancho Pistachio, supra. That decision found the nonaccessibility argument that Appellant makes before us, as it relates to value, to be without merit when the boulders were shown to be accessible by the fact that Appellant accessed and removed them. Id. at 209. We similarly find that Appellant's actions in accessing and removing the 473 tons of boulders here despite the transportation and distance requirements, absent any evidence of costs submitted by Appellant to the contrary, reflects that the in-place value of \$10 per ton established in the 1994 appraisal was not unreasonable. Nor are we persuaded by Appellant's argument in its Reply concerning the fracturing within the remaining, and thus unaccessed, boulders within secs. 28 and 33. See Reply at 5. The condition of boulders not selected for removal by Appellant can hardly be compared with those selected and sold.

6/ In El Rancho Pistachio, supra, Appellant was concerned with minerals on 453 acres within both secs. 28 and 33, T. 11 N., R. 6 W., Gila and Salt River Meridian, Yavapai County, Arizona. 147 IBLA at 205. Using the 1990 Fisk Report, Appellant claimed the mineral estate on both of those sections had no value. Id. at 207. Thus, while the trespasses in this case apparently occurred only in sec. 28, Appellant and BLM apparently agree that the value ascribed to the boulders in sec. 28, and in the adjacent sec. 33, is equivalent. For this reason, it is not inappropriate for BLM to use comparables from sec. 33 to determine value for boulders removed from sec. 28.

[1] Mineral material trespass is prohibited by 43 C.F.R. § 3603.1, which states:

Except when authorized by sale or permit under law and the regulations of the Department of the Interior, the extraction, severance or removal of mineral materials from public lands under the jurisdiction of the Department of the Interior is unauthorized use. Unauthorized users shall be liable for damages to the United States, and shall be subject to prosecution for such unlawful acts (see subpart 9239 of this title).

Under 43 C.F.R. § 9239.0-7, unauthorized removal of mineral material from public land constitutes an act of trespass for which the trespasser is liable in damages to the United States. Bolling Construction Co., 125 IBLA 303, 306 (1993); Frehner Construction Co., 124 IBLA 310, 312 (1992); Curtis Sand & Gravel Co., 95 IBLA 144, 161, 94 I.D. 1, 10 (1987).

Appellant admits that the 473 tons of boulders were removed after April 5, 1994, the date the 1994 Appraisal was signed. See Reply at 2, admitting erroneous statement in SOR. The record also reflects that BLM employees observed the Appellant remove 60 tons in trespass from private land in which the mineral estate was owned by the Federal Government on January 12, 1996. Appellant has not challenged this determination. Section 6 of the contract states that it "shall expire one (1) year from the date of approval unless an extension of time is granted." The contract was effective June 15, 1990. Therefore, it expired on June 14, 1991, absent the grant of an extension. There is no extension noted in the case record nor does Appellant contend that any extension was granted. Thus, it is clear that the contract expired before the boulders were removed.

Appellant states that it thought it was still operating under the initial contract with respect to the 473 tons and its buyer had not given it a report of the tonnage. (Reply at 1.) However, Appellant signed the contract and is presumed to know when it expired. Moreover, regardless of when the contract may have expired, it authorized removal of no more than 2,000 tons of boulders. (Contract, sec. 2.) Consequently, any amount removed above those 2,000 tons was without authorization by permit or sales contract.

In his decision, the Field Manager concluded that by Appellant's continued operations after the expiration of contract AZA-24566 and because of Andersen's previous knowledge of the contracting process, it constituted a willful trespass. (Decision at 2.) He then assessed damages for willful trespass in accordance with the State of Arizona statutes, which provide for treble damages for willful trespass. Arizona Revised Statutes § 37-502. Application of state law was in accordance with 43 C.F.R. § 9239.0-8, which provides that the "rule of damages to be applied in cases of * * * [mineral materials] trespass * * * will be the measure of damages

prescribed by the laws of the State in which the trespass is committed." See Mason v. United States, 260 U.S. 545, 558 (1923); Frehner Construction Co., 124 IBLA at 312. Thus, BLM was right to apply state law in calculating damages.

BLM's conclusion that Appellant had knowledge of the contracting process is supported by a print-out in the case record showing Joe Andersen and J. Vance Andersen as being either a party to or agent for a party to four other mineral material sales contracts (AZA-024477, AZA-024488, AZA-029036, AZA-029468). Generally speaking, when a person knew or should have known that the trespass was occurring, failure to take reasonable steps to prevent trespass justifies a finding that the trespass was willful. See Holland Livestock Ranch, 52 IBLA 326, 347, 88 I.D. 275, 287 (1981), vacated on other grounds, Holland Livestock Ranch v. United States, 543 F. Supp. 158 (D. Nev. 1982), aff'd, 714 F.2d 90 (9th Cir. 1983) (grazing trespass); Mountain States Telephone & Telegraph Co., 34 IBLA 154, 156-57 (1978). If Appellant did not know, it should have known, that excess boulders were being removed and that the removal was well after the contract had expired. Frehner Construction Co., 124 IBLA at 315-316. Thus, we conclude that the trespass was the result of a reckless disregard of the expiration date and quantity limits of the contract and was therefore willful. Bolling Construction Co., 125 IBLA at 307. The Field Manager correctly applied the law in assessing treble damages.

As noted above, Appellant's main challenge is to the 1994 Appraisal on which BLM based its decision that the boulders should be valued at \$10 per ton. ^{7/} Apart from the issues of the applicability of the Fisk Report and nonaccessibility claims, determined by our prior decision in El Rancho Pistachio, *supra*, we address Appellant's contention that the value of \$10 per ton established by the 1994 Appraisal is in error and that BLM improperly failed to consult it in establishing the in-place value.

[2] A party challenging a BLM appraisal is generally required to show error in the methodology used in determining fair market value "and/or that the value assigned to the land or commodity exceeded its fair market value." H. E. Hunewill Construction Co., 137 IBLA 101, 107 (1996), citing London Bridge Broadcasting, Inc., 130 IBLA 73, 77 (1994); see Richard Connie Nielson v. BLM, 125 IBLA 353, 358 (1993). "An appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the charges are excessive." See KSEI, Inc., 120 IBLA

^{7/} BLM also argued in its Answer that Appellant is attempting improperly to appeal the 1994 Appraisal and contends the time for appeal has expired. We disagree that Appellant is attempting to appeal the appraisal. Appellant must challenge the appraisal BLM relied on to determine the value of the boulders if it is to carry its burden of proof. Moreover, Appellant was not adversely affected by the 1994 Appraisal until BLM used it to value the boulders. See The Pittsburgh & Midway Coal Mining Co. v. OSM, 140 IBLA 105, 110 (1997); 43 C.F.R. § 4.410(a).

266, 267 (1991), citing High Country Communications, 105 IBLA 14, 16 (1988); but see Lone Pine Television, Inc., 113 IBLA 264, 266 (1990) (setting aside and remanding a BLM appraisal even though appellant had not done an independent appraisal, because it had made a "comparison" that raised "significant questions" concerning the accuracy of the BLM appraisal).

The objective of the 1994 Appraisal was to develop a fee schedule for landscape boulders sold from public lands. (1994 Appraisal, "Appraisal Review Statement" at 1.) It was prepared in connection with a proposed sale of boulders in E½ NW¼, sec. 4, T. 10 N., R. 6 W., which is south of Appellant's land. No one site or material was valued, "rather the typical royalty rate, to the extent it can be determined, [was] sought." Id. 8/ BLM admits that it cannot use a master appraisal to establish the value of materials "without making a thorough comparison of the various factors considered in appraising the representative material." (Answer at 7-8, citing Richard C. Nielson, 129 IBLA 316, 326 (1994).) However, it argues that the representative material in the 1994 Appraisal matched the material at issue here. (Answer at 8.)

The comparable transaction method of appraisal used in the 1994 appraisal is the preferred method where there is sufficient information regarding such transactions and appropriate adjustments are made for any differences between the subject transaction and other transactions in terms of relevant factors affecting fair market value. See Richard C. Nielson, 129 IBLA at 325. In earlier cases we have noted our discomfort with BLM's reliance on a master appraisal. However, such appraisals have been permitted where the appraisal contains sufficient information to permit a party to challenge the accuracy of the data on appeal, as well as a meaningful review by the Board. Questar Service Corp., 119 IBLA 65, 68 (1991); Union Pacific Railroad Co., 114 IBLA 399, 403-04 (1990).

The 1994 Appraisal recognized that fair market value could "vary from site to site in the same general location due to factors such as quality and quantity of rock, mining and transportation costs and other relevant factors." (1994 Appraisal, Apr. 5, 1994, Memorandum from Staff Appraiser to Review Appraiser.) Therefore, the appraisal provided a range of values that could be adjusted for site specific conditions rather than a specific dollar figure. Id. The appraisal included 34 boulder material sales in the BLM Phoenix District. The location of each of the sales was provided, as well as names of lessors and lessees, the transaction date, type of material, and the royalty and/or contract rate. (Appraisal at 2.) In addition, there were explanatory remarks for each sale, including whether the price was adjusted for access problems or road construction. Thus, the appraisal provided sufficient information to permit Appellant to challenge the accuracy of the data.

8/ The appraiser explained that "mineral rights 'royalty' is generally a combination of rent and depletion payment." (1994 Appraisal at 10.)

Of the 34 sales reviewed in the 1994 Appraisal, BLM identified sale Nos. 2, 13, and 14 as comparables. All three comparable sales were identified as being for surface mined boulders from the Joe V. Anderson ranch on the northeast side of the railroad in portions of secs. 8, 9, and 33, T. 11 N., R. 6 W. Sale No. 2 had a transaction date of 1988/1989 and a contract rate that ranged from a start-up rate of \$2.17/ton for raw material to \$10/ton adjusted rate "plus road cost credit." Sale No. 13 had a transaction date of October 1993, with an adjusted rate after doing road construction of \$10/ton. Sale No. 14 also had a transaction date of October 1993 and reported contract rates beginning at \$10/ton for raw material. Appellant has presented no data to show that these comparables are inapposite, nor has it provided the sales prices received from its own sales or otherwise established that a different price would be more appropriate, a seemingly critical element if it intends to show BLM overvalued the boulders in the contract area. An appellant has the burden of showing error in the challenged decision and supporting its allegations with evidence demonstrating error. "Conclusory allegations of error or differences of opinion, standing alone, do not suffice." King's Meadow Ranches, 126 IBLA 339, 342 (1993). Quite simply, Appellant has failed to challenge the data used by BLM on appeal, despite its opportunity to do so before this Board.

Appellant also argues that it should have been permitted to provide input to the 1994 Appraisal. However, to the extent this is an argument that Appellant was denied due process, it must be denied. There is no right to comment on an appraisal until the Appellant is affected by its application. At that point the Appellant's right to be heard is satisfied by appeal to this Board. See M. L. Petersen, 152 IBLA 379, 395 (2000).

Appellant also urges that it has been unfairly treated because the 1994 Appraisal has only been applied to Appellant. (Reply at 3.) However, the 1994 Appraisal would apply to any party purchasing boulders from BLM in that area for the same time period, and subject to comparison of relevant factors. Appellant appears to assume that it is the only party that would purchase boulders from the land in question, but there is nothing to prohibit BLM from selling the boulders to another party.

Under 43 C.F.R. § 3610.1-2(b), mineral materials are to be reappraised at intervals of not less than 2 years and the contract unit price adjusted accordingly. The boulders were removed after the 1994 Appraisal, but Appellant would have BLM ignore that appraisal and continue to rely on the 1988 Appraisal used in the Fisk Report. There is evidence in the record that the market for boulders changed after the contract was signed and the appraisal BLM relied on is sufficiently detailed to support its determination as to value.

Appellant states that it objects to the reasonableness of the administrative costs but has not provided any evidence to support this objection. Therefore, we affirm BLM's assessment of costs. Appellant further requests the names and addresses of every person for whom costs are alleged

and their telephone numbers. (SOR at 2.) However, even if such information was available to this Board, Appellant has made no submission as to why such information is necessary and the request is denied.

Appellant has also requested an evidentiary hearing. "Although authorized under 43 C.F.R. § 4.415, a hearing is required only when the record before the Board presents conflicting issues of fact that cannot be resolved on the basis of that record." Pine Grove Farms, 126 IBLA 269, 275 (1993), and cases cited therein. "A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the appeal." See Natec Minerals, Inc., 143 IBLA 362, 373-74 (1998) (citations omitted). While Appellant makes a conclusory claim that two statements made in the record are false (Reply at 6-7), it offers no evidence of the materiality of those statements in the context of the total record, nor do we find that Appellant has identified any material issue of fact which cannot be resolved by the Board on the record before us. Therefore, a hearing is not warranted and the request is denied. Santa Fe Minerals, Inc., 145 IBLA 317, 326 (1998).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge

